U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue date: 08Aug2001

Case Number: 2001-INA-52
P1997-CA-0905

In the Matter of:
Nouveau Craft
Employer.
On behalf of:
Juan Castillo-Medina
Alien.

Certifying Officer: Pandora Wong
San Francisco, CA

Appearance:
Eliezer Kapuya, Esq.
For Employer

Before: **Burke, Chapman, and Wood**

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Juan Castillo-Medina ("Alien") filed by Nouveau Craft ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. § 656.26.

The following decision is based on the record upon which the Certifying Officer denied certification and Employer's request for review, as contained in the Appeal File ("AF") and any written argument of the parties.

STATEMENT OF THE CASE

On February 28 1996, Employer filed an application for labor certification on behalf of the Alien for the position of Sales Service Representative. (AF 24-25).

On August 9, 2000 the CO issued her Notice of Findings (NOF) indicating her intent to deny the application on the grounds that the Employer rejected U.S. applicants for other than job related reasons in violation of 20 C.F.R. § 656.21(b)(6). (AF 20-22). The CO found that the evidence provided by Employer was insufficient to demonstrate that he made good faith efforts to contact U.S. applicants, and requested that Employer's rebuttal provide details of attempts to interview the U.S. applicants. Additionally, the CO concluded that the recruitment was tardy and incomplete.

In his Rebuttal dated August 25, 2000, the Employer claimed that it was extremely unfair to question the recruitment process after four years had passed. (AF 5-19). Employer stated that after so much time had passed, he could not find original notes. As evidence of his good faith effort, Employer attached a sworn affidavit that he signed and notarized,[1] indicating that he contacted every applicant within five days of receiving the resumes, and that he interviewed several candidates, giving them full consideration. Additionally, Employer argued that the NOF was vague. Employer's rebuttal quoted extensively from the seventh edition of "Kurbanz's."[2]

On October 18, 2000 the CO issued a Final Determination (FD) denying certification. (AF 3-4). The CO found that in his Rebuttal, the Employer did not provide any evidence supporting his good faith recruitment, as required by the NOF.

On October 23, 2000, Employer filed his Request for Review (AF 1-2), alleging that the CO's reason for denial was vague, and that her determination was arbitrary and was guesswork, not based on fact or law. On February 20, 2001, Employer submitted a brief in support of his position. Additionally, Employer resubmitted his Rebuttal to be considered by the Board.

DISCUSSION

A recruitment report must describe the details of the employer's recruitment efforts to be sufficient. *Yaron Development Co., Inc*., 1989 INA 178 (Apr. 19, 1991) (*en banc*). A general recruitment report provides an insufficient basis upon which to conclude that the employer engaged in good faith recruitment and had job-related reasons for rejecting U.S. applicants. *Nitto Denko Am., Inc.*, 1991 INA 93 (Apr. 1, 1992); *TPK Constr. Corp.*, 1991 INA 223 (June 30, 1992).

Here, the Final Documentation Notice sent to the Employer by the EDD on November 12, 1996, directed the Employer to submit his recruitment report, with specific instructions on what was to be included in the report. The EDD asked the Employer to report the results of all recruitment efforts, and to provide copies of any correspondence that was sent. The Notice reflects that five applicant names were provided to the Employer on September 9, 1996, and that

[1] It appears that Employer is a Notary Public; he self-notarized his signature.

[2] Presumably, the Employer was referring to I. Kurzban, *Kurzban's Immigration Law Sourcebook: A Comprehensive Outline and Reference Tool.*

an additional six applicant names were provided with the Notice. The Employer was instructed to contact these six applicants within fourteen days.

Employer's Recruitment Report, dated December 3, 1996 (AF 29), is a one page document, with no evidence to support the claims in the report. In this Report, the Employer suggested that there was an interview with three of the five applicants first referred, but provided no details, such as the date or location of the interview, or the identity of the person who interviewed the applicants. The Employer reported that one of these applicants wanted to work as an independent contractor, and not an employee; one admitted that he did not have the required experience; and one had already gotten a job. The Employer claimed that the other two applicants, out of the original five referred, did not have the required experience. The Employer did not even suggest that he had attempted to contact these two applicants.

Although the instructions in the Final Documentation Notice specifically required the Employer to contact the six applicants referred with that letter, the Employer reported in his Recruitment Report that these applicants did not attempt to contact him. There is no suggestion that the Employer attempted to contact any of these applicants as instructed.

In her NOF, the CO noted that there was insufficient evidence that the Employer attempted to contact two of the applicants that the Employer claimed to have interviewed, and that the evidence supplied by the Employer was not convincing that the Employer made any efforts to contact the applicants, or "as early as possible," as directed by the EDD. The CO concluded that the evidence did not show that the Employer conducted a good faith recruitment effort. The Employer was instructed to provide details of his attempts to interview the U.S. applicants. (AF 24). Although the Employer argues that the NOF is vague, the CO's message was clear: the Employer did not submit enough evidence to show that he in fact contacted the U.S. applicants, a deficiency that could be cured by providing the specific details of his attempts, supported by dated return receipts and/or telephone bills.

In response, the Employer provided a self-notarized affidavit claiming that he contacted the applicants within five days of receiving their resumes. The Employer did not specify the method of contact - i.e., telephone or mail - or provide copies of any letters that were sent. Nor did the Employer provide any details whatsoever about the alleged "interviews," or even identify the "several" candidates who were "interviewed." Moreover, six of the applicants did not submit resumes, but their names and pertinent background information, including addresses and telephone numbers, were forwarded to the Employer by the EDD. The Employer provided no information about any attempts to contact these applicants.

The Employer bears the burden in labor certification both of proving the appropriateness of approval and ensuring that a sufficient record exists for a decision. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996 INA 64 (May 15, 1997).[3]

[3] Thus, contrary to Employer's counsel's demand that the CO produce the evidence to support her conclusion, it is the Employer's burden to come forward with the information and documentation necessary to establish that certification is appropriate.

Failure to address a deficiency noted in the NOF supports a denial of labor certification. *Reliable Mortgage Consultants*, 1992 INA 321 (Aug. 4, 1993). Under the regulatory scheme of 20 C.F.R. §656.24, the Rebuttal following the NOF is the employer's last chance to make his case. It is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued. *Carlos Uy III*, 1997 INA 304 (Mar. 3, 1999) (*en banc*).

The Employer's justification for his failure to provide any evidence was that so much time had passed that he could not find any notes or records concerning the recruitment process. Passage of time does not obviate Employer's duty to document his recruitment efforts. Even if no notes or records existed, it would be reasonable to expect the Employer to be able to provide some level of detail about his recruitment efforts. Moreover, the Employer was put on notice in September 1996 as to the information and documents, and the level of detail that was required about his recruitment efforts in the Recruitment Report. Yet the Employer provided only vague and unsupported statements in his Recruitment Report (prepared at a time when notes and records were presumably still available), and in neither the recruitment report nor in the Rebuttal did the Employer even allege that he had attempted to contact the six applicants referred by the EDD on September 9, 1996. The Employer's Rebuttal was a self-serving and self-sworn affidavit, with vague and conclusory statements affirming his recruiting efforts. Bare assertions by Employer are not sufficient to carry his burden of demonstrating good faith recruitment. *Brilliant Ideas, Incorporated*, 2000 INA 46 (May 22, 2000); *Inter-World Immigration Service*, 1988 INA 490 (Sept. 1, 1989).

The Employer devoted a great deal of his brief to quoting from *Kurzban*, but he did not articulately explain how the quoted portions applied to this particular case. Nor is the caselaw cited by the Employer on political asylum relevant to any issue here. We do agree that an employer's written assertions that are reasonably specific and indicate the sources or bases constitute "documentation." *Gencorp*,1987 INA 659 (Jan.13, 1988) (*en banc*). Unfortunately for the Employer, the statements in its Recruitment Report and Rebuttal were not at all specific, nor did they indicate their bases or sources. Additionally, the Employer completely failed to address the question of its attempts to contact the six more recent applicants.

Based on the foregoing, we conclude that the Employer has not met his burden of establishing that he engaged in a good faith recruitment effort, and based on the foregoing, we conclude that Employer's labor certification was appropriately denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED.**

For the Panel:

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LINDA S. CHAPMAN
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.